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which equity obtained its authority to give relief—to take cognizance of the existence of such a right, namely, an accounting between co-tenants where one has received more than his share of the profits. But the revisors, having seen fit to abolish this foundation, not only is the action of account abolished but the vital right of the other co-tenant to hold the occupying tenant liable for the latter's overplus of profits, is likewise abolished. The result seems most unfortunate.

S. B. W.

SOLDIERS' WILLS—TESTAMENTARY INTENT.—Due to the fact that soldiers and sailors in the active service of their country are often placed in positions where they have neither time nor legal advice for the proper preparation of their wills, the courts have adopted a policy of leniency in the construction of such instruments. Statutes exist in most, if not all, States favoring the wills of soldiers and sailors while in actual service.¹ A Soldiers and Sailors Act was passed in England during the late war to take care of just such wills.²

The question recently arose in this State where a soldier's letter, written from France to his wife, was admitted to probate as a will.³ The part construed as testamentary said, “* * * don't worry about the lotment or insurance for you will get everything that is coming to me. * * * I have just fixed the insurance and lotment so you will get it alright.” The object of this brief note is to discuss whether or not the instrument should have been interpreted as a will. The court while admitting the words “had fixed” were not in themselves testamentary in character, yet justified its holding by saying that such construction was in keeping with what the soldier-husband expected and desired to be done. Other letters were introduced showing his affection for his wife, and why he should want his property to go to her. As authority for its decision, the court cited an English case, *Gattward v. Knee*.⁴ It is submitted that the English case is to be distinguished from the case at bar in that the soldier there evidently had the *animus testandi* while writing the letter, for he advised the person addressed to keep it in case it should be wanted later, although the writer went on to say he would make a will in favor of the person addressed. The letter, it would seem, was intended to take the place of a will until a more formal instrument could be drawn up. In the case at bar the testator, as the court acknowledges, had no intention of making the letter serve as his will; there was no *animus testandi*; he intended to

¹ See Va. Code 1919, Sec. 5231.

² Wills (Soldiers and Sailors) Act 1918 (7 & 8 Geo. 5 c. 58), S. 3. See *Godman v. Godman*, Law Rep. 1920 Probate Div. 261; *In re Yates*, Law Rep. 1919, Probate Div. 93.

³ *Rice v. Freeland* (Va.), 109 S. E. 186 (1921).

⁴ 4 B. R. C. 910, Law Rep. 1902 Probate Div. 99.

pass no property by it upon his death. Without this testamentary intent there can be no will.⁵

The Virginia case of *McBride v. McBride*,⁶ is cited as not being opposed to such a construction of the letter as a will, but that case cites and affirms a dissenting opinion by Judge Cabell in *Sharp v. Sharp*,⁷ which reads:

"A paper is not to be established as a man's will, merely by proving, that he intended to make a disposition of his property similar to, or even identically the same with, that contained in the paper. It must satisfactorily appear that he intended the very paper to be his will."

This quotation undoubtedly condemns calling an instrument a will just because it may express what the testator would have done in his will, had he made one, but until he makes it, then such wishes cannot be given effect. That is the case at bar. The soldier by his letters showed he wished his wife to have his property upon his death, and thought she would get it by arrangements previously made, but he never intended this letter to operate as a will or even to pass any property at his death. He evidently thought he had formerly arranged the matter of his property.

The leniency of the courts towards the wills of active service men has directed its work rather to waiving technical formalities⁸ than trying to construe as a will some writing that was not intended as testamentary. The *animus testandi* is a fundamental prerequisite, and cannot be supplied by any other than the testator himself. But when once shown it is well for the courts to show favor to soldiers and sailors by waiving formalities of execution. However when our courts begin to construe as done *animo testandi* what is really not so done, they may be doing justice in that particular case, but they are laying down as a precedent something that will make even more chaotic our present law of wills, with the result that the will chosen for a soldier, by the courts, may not be the instrument he actually made *animo testandi*.

While on this subject it may be interesting to read these two articles: "Odd French Wills,"⁹ and "Legal Objections Raised by the European War—Soldiers' Wills."¹⁰

F. B. F.

INFANTS—FRAUDULENT REPRESENTATIONS AS TO AGE—RELIEF FROM CONTRACT IN EQUITY.—The question whether in equity an infant will be estopped to allege infancy on a contract which was

⁵ 40 Cyc. 1077; *Early v. Arnold*, 119 Va. 500, 89 S. E. 900 (1916); *Clark v. Hugo* (Va.), 107 S. E. 730 (1921); *Smith v. Smith*, 112 Va. 205, 70 S. E. 491 (1911).

⁶ 26 Gratt. 476 (1875).

⁷ 2 Leigh 249 (1830).

⁸ See *Leathers v. Greenaire*, 53 Me. 561 (1866).

⁹ Case and Comment, November 1917, p. 518.

¹⁰ 79 Cent. L. Journal 388.